MOTION FILED
JUN 30 1999

(15)

No. 98-1161

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1998

CITY OF ERIE, PA., *et al.*,
Petitioners,

v.

PAP'S A.M.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

MOTION OF ORANGE COUNTY, FLORIDA, BY THE HONORABLE MEL MARTINEZ, AS COUNTY CHAIRMAN FOR ORANGE COUNTY, FLORIDA, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS, FOR LEAVE OF COURT TO FILE UNTIMELY SERVED BRIEF

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5 pp

MOTION

Pursuant to Rule 21 of the Rules of the Supreme Court of the United States, Orange County, Florida, files this motion requesting this Court to accept for filing the *amicus curiae* brief in support of Petitioners that it untimely served on August 20, 1999.

Orange County served a 21-page *amicus curiae* brief by priority mail on Friday, August 20, 1999, with the Clerk of this Court, counsel of record for the parties, and *amicus curiae* Morality in Media, Inc. It did so pursuant to Rule 37.4 allowing such briefs to be filed without leave when submitted on behalf of a county by its authorized law officer.

The undersigned attorney understands that, as he expected, the brief was received by the Clerk of this Court, the parties, and the other *amicus* on Monday, August 23, 1999.

Late in the afternoon on Tuesday, August 24, 1999, the Office of the Clerk of this Court informed the undersigned attorney by voicemail that Orange County's *amicus curiae* brief had not been timely filed, but was seven (7) days late.

The Office of the Clerk of this Court simultaneously advised the undersigned counsel that if Orange County wished to have this Court consider accepting the untimely filed *amicus curiae* brief, it would have to submit a motion seeking such relief, and that such motion would have to be prepared in the format described under Rule 33.1 for the filing of *amicus curiae* briefs submitted in support of Petitioners. That is the purpose of this motion.

At the outset,Orange County apologizes for any inconvenience that it may have caused this Court or the Clerk of this Court by not timely filing the *amicus curiae* brief.

Orange County, which did not learn that this case was pending before this Court until August 1999, had been led to believe that the due date for filing its *amicus curiae* brief on behalf of Petitioners was August 23, 1999.

The undersigned attorney recognizes that he is solely

responsible and at fault for not timely filing the *amicus curiae* brief. The undersigned attorney understands that, rather than relying upon the word of a third party, he should have contacted the Clerk of this Court to determine the due date for filing an *amicus curiae* brief on behalf of Petitioners.

Nevertheless, for the foregoing reasons, Orange County respectfully requests that it be permitted to file the *amicus curiae* brief that it untimely served in support of Petitioners on August 20, 1999.

Yesterday, the undersigned counsel contacted counsel of record for the parties, *including for the Respondent*, about this matter, and counsel of record, *including for the Respondent*, have informed the undersigned attorney that they do not have an objection to Orange County filing an *amicus curiae* brief, even though it was not timely served.

Furthermore, Orange County understands from counsel of record for the Respondent that Respondent's brief is not due to be filed with this Court until on or about September 30, 1999, approximately just over a month from today, and therefore submits that Respondent will have an adequate opportunity to reply to Orange County's *amicus curiae* brief (assuming that Respondent believes that a reply is even necessary or warranted).

Orange County, which as noted above prepared its *amicus curiae* brief pursuant to Rule 37.4, is a body corporate and politic existing under the laws of the State of Florida and the Orange County Charter. The Honorable Mel Martinez is the duly elected County Chairman for Orange County under the Orange County Charter. Pursuant to the Orange County Charter, the County Chairman is the chief executive of Orange County, with the authority to assure the faithful execution of all Orange County ordinances, resolutions and orders, and to ensure that they are enforced.

Orange County filed its *amicus curiae* brief in support of Petitioners because it is presently defending against a challenge in federal court to the constitutionality of an Orange County public nudity ordinance similar to the City of Erie public indecency ordinance which is the subject of the certiorari

proceeding pending before this Court. (Orange County's ordinance was adopted by the Orange County Board of County Commissioners by Ordinance No. 92-33 on October 28, 1992, and is codified at Section 26-26 of the Orange County Code. In the event this Court would like to review the ordinance, a copy is attached to the *amicus curiae* brief as an Appendix.)

The federal lawsuit against Orange County has been brought in the Middle District Court for Florida in a case styled *Kim Gatena v. Orange County, Florida*, Case No. 98-417-CIV-ORL-22B. The Honorable Anne C. Conway, District Judge, is presiding. Like a majority of the Supreme Court of Pennsylvania declared in *Pap's A.M. v. City of Erie*, 553 Pa. 348, 719 A. 2d 273 (1998), Ms. Gatena is asserting, in part, that *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), a plurality opinion where this Court upheld the federal constitutionality of a nearly identical Indiana public indecency statute, is not binding precedent.

Orange County, being faced through its County Chairman with the duty of executing and enforcing the laws of Orange County, Florida, and the burden of defending against such federal lawsuits, has a keen interest in the resolution of the issue of whether a public nudity law along the lines of the City of Erie's passes constitutional muster.

Orange County believes that its *amicus curiae* brief brings to the attention of the Court relevant matter not already brought to its attention by the parties.

Again, Orange County apologizes for any inconvenience that it may have caused this Court by the untimely service of the subject *amicus curiae* brief.

CONCLUSION

Based on the foregoing reasons, Orange County respectfully requests that the Clerk of this Court be permitted to accept for filing the *amicus curiae* brief that Orange County untimely served in support of Petitioners on August 20, 1999.

Respectfully submitted,

By: Joel D. Prinsell
Joel D. Prinsell
Senior Assistant County Attorney

August 27, 1999